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IN THE
COURT OF APPEALS OF INDIANA

JEFFERY D. BANTER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 09A04-0611-CR-629
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CASS SUPERIOR COURT
The Honorable Richard Maughmer, Judge
Cause No. 09D02-0401-FB-0001

JUNE 7, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBERTSON, Senior Judge

STATEMENT OF THE CASE.

Defendant-Appellant Jeffery D. Banter ("Banter") brings this direct appeal from his conviction by a jury of the Class B felony of manufacturing methamphetamine and the Class D felony of possessing methamphetamine. Banter was sentenced to ten years, all executed, on the class B felony. The trial court imposed no sentence on the class D felony.

We affirm.

ISSUES

Banter states the issues as:

1. Whether the Trial Court erred in denying the defendant's Motion to Suppress and subsequently admitting evidence taken from the defendant's house at trial.
2. Whether the Trial Court erred in allowing evidence of the test results on substances alleged to be methamphetamine in the absence of the technician who performed the tests.
3. Whether the Trial Court abused its discretion in sentencing the defendant by failing to consider significant mitigators that were clearly in the record, and whether the sentence rendered is inappropriate in light of the nature of the offense ad the character of the offender.

FACTS

At the trial evidence would show that probation officers were investigating Jeff Benn on his property that was adjacent to Banter's property and home. They discovered methamphetamine in Benn's possession as he walked from Banter's property toward his own property. The probation officers called the police and Officers Schnepp and Mote arrived. Schnepp spoke with Banter about Benn's pick up truck that was located on Banter's property and contained Benn's methamphetamine lab. Schnepp asked for permission from Banter to search the truck.

Banter told Schnepp that he had difficulty reading and writing, so Schnepp waited while Banter called a friend who worked for an attorney. Banter wanted to clarify what the police were searching for. This was done prior to the consent to search form being filled out. Schnepp read the form and explained to Banter who initialed the several paragraphs, and then signed it. The police found methamphetamine in Benn's truck.

After the methamphetamine was found, Officer Mote asked Banter exactly where else the police could search on Banter's property. Mote saw items in plain view, including an HCL generator, on Banter's property. Banter asked Mote where he wanted to search, and Mote replied anywhere that Banter would allow. Banter told Mote that he already given Schnepp a consent form. Mote asked Banter if the consent applied to all of Banter's property and especially the pole barn. Banter said "sure" and escorted Mote out to the pole barn. In the pole barn Mote saw items necessary for the manufacture of methamphetamine. Banter gave permission for a search of his home where the police found further evidence of methamphetamine manufacturing. The police obtained a search warrant and the police found further evidence of manufacturing including items which tested positive for methamphetamine.

Prior to trial Banter filed a motion to suppress. The motion alleges that Banter was not advised of his right to counsel prior to the search: that Banter's consent to search was not voluntary; that the police exceeded Banter's consent to search; that Banter was incapable and unable to appreciate the full meaning of his Miranda rights; and, under the totality of the circumstances the search was unreasonable. After an evidentiary hearing the trial judge denied the motion to suppress. At the beginning of the trial Banter made a

continuing objection, and during the trial made objections as the evidence was introduced.

Further facts will be added as needed.

DISCUSSION AND DECISION

Issue 1.

The State raises a question relating to the standard of review for this issue. Banter did not take an interlocutory appeal from the trial court's ruling on his motion to suppress. In that case the proper procedure is for the defendant to make a contemporaneous objection at trial when the subject evidence is offered. *See Washington v. State*, 784 N.E.2d 584, 586 (Ind. Ct. App. 2003). The trial court's denial of a motion to suppress is insufficient to preserve error for appeal. *Id.* The issue is, in reality, whether the trial court erred in admitting the evidence. *Id.*

The admission or exclusion of evidence is a matter left to the sound discretion of the trial court. *J.D.P. v. State*, 857 N.E.2d 1000, 1006 (Ind. Ct. App. 2006). When reviewing a trial court's decision under an abuse of discretion standard, we will affirm if there is any evidence supporting the trial court's decision. *Id.*

The consent to search form signed by Banter contained paragraphs which informed him that he had a right not to have a search made of his premises or property without the police having to first obtain search warrant; that the police officers do not have a search warrant authorizing the search and that Banter had the right to refuse permission for the search; that Banter has the right to privately talk with a lawyer before consenting to the search; that Banter voluntarily gives up the right to talk with a lawyer;

that Banter freely and voluntarily gives his consent to search his person, a white Ford truck (Benn's truck), his premises; that Banter's consent is given without anyone making threats or promises to him; that Banter is not under the influence of drugs or alcohol; that any evidence found could be used against him in court; and, the police are authorized to take from the premises any [evidence] they may desire. Banter signed his initials at the end of the several paragraphs contained in the search consent form as well as signing the bottom of the form and filling in the date and time of the consent.

The determination of whether consent was voluntary is a question of fact. *State v. Scheibelhut*, 673 N.E.2d 821, 824 (Ind. Ct. App. 1996). *Scheibelhut* holds that consent must be determined from the "totality of the circumstances" and then lists seven considerations that the court could take into account in making such a determination. The reviewing court is ill-equipped to make factual determinations. *Id.*

The first consideration mentioned in the *Scheibelhut* case is whether the defendant was advised of his *Miranda* rights. The evidence shows that during the searching process Banter was not under arrest. The law enforcement officer's duty to give *Miranda* warnings does not attach unless the defendant has been subjected to custodial interrogation. *King v. State*, 844 N.E.2d 92, 96 (Ind. Ct. App. 2005). Nonetheless, the consent form contained advisements as to the right to refuse the search, the right to speak to a lawyer, and Banter's consent to make the search, all of which could have influenced the trial judge that the equivalent of a *Miranda* warning was achieved.

The second consideration is the defendant's degree of education and intelligence. During the searching process, the police were made aware of Banter's difficulty with

reading. The police read the consent to search form and explained it to Banter and waited while he called an acquaintance who worked for a local attorney for further information. This conduct by the police could have made the trial judge conclude that, under the circumstances, a reasonable effort was made to accommodate Banter's degree of education and intelligence.

The third circumstance is whether the defendant was advised of his right not to consent. As indicated above, the admonition that Banter had a constitutional right to refuse the search was included in the consent to search form that Banter had explained to him by the officers. Banter did tell Officers Mote and Burgess that they were the only two police officers allowed in his home.

The fourth consideration is whether the police made any express or implied claims of authority to search without consent. The consent to search form included that there were no threats or promises made to Banter. Additionally, Banter consented to the search of the pole barn and his residence.

The fifth consideration of whether the police were engaged in any illegal action prior to the request to search does not seem to have any application to this issue.

The sixth consideration of whether Banter was cooperative requires an affirmative answer. Consideration number seven, whether the police were deceptive to their true identity or purpose of the search, requires a negative answer.

We are of the opinion that there is evidence to support the trial court's decision to deny Banter's objections, and that there is no abuse of discretion.

Issue 2.

As in the preceding issue the admission or exclusion of evidence is a matter left to the sound discretion of the trial court. *J.D.P.*, 857 N.E.2d at 1006.

The lab technician who performed the tests on the substances found on Banter's property had moved to Florida about a year and a half before the trial, and was not available for trial. The State called Troy Ballard, the supervisor of the lab technician who performed the tests, to testify instead. Banter's major objections to Ballard's testimony were based upon hearsay and a violation of the confrontation clause of the federal Sixth Amendment.

The case of *Jenkins v. State*, 627 N.E.2d 789 (Ind. 1993) bears great factual resemblance to the confrontation clause component of this issue. In that case, where the supervisor testified instead of the lab technician, the court on appeal said:

> Every defendant has the right to be confronted by his accusers and by witnesses who will testify against him and has the right to cross-examine them. However, the right of confrontation is not absolute and must occasionally give way to considerations of public policy and necessities of the case. The failure of the State to call a competent witness does not deny a defendant his constitutional right. The State cannot be compelled to call witnesses at the insistence of the accused. Appellant has the burden of seeing that witnesses who may have aided in his defense are called.

Id. at 792-3. (Citations omitted.)

It would appear that the State's failure to call the lab technician does not violate the confrontation clause. It also would appear that the necessities of the case, the absence of the lab technician, would allow the supervisor to testify in lieu of the lab technician. Ballard testified as to his duties as a supervisor and his responsibilities for the work that the former lab technician did. The *Jenkins* court, in reliance on *Reardon v. Manson*, (2nd

Cir. 1986), 806 F.2d 39, held that the use of the supervisor, under conditions similar to this current appeal, was acceptable because the lab technician would have to rely on the same notes that the supervisor would use in testifying. *Id*. at 793.

Moreover, the supervisor in this case, as in the *Jenkins* case, made a confirmatory test from which they could also draw their own conclusions and testify accordingly.

The State counters Banter's hearsay argument by saying that the evidence was admissible as a business records exception to the hearsay rule. Ind. Evidence Rule 803(6) says:

> Records of Regularly Conducted Business Activity. A memorandum, report, record, or data compilation, in any form of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony or affidavit of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. The term "business" as used in this Rule includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

The supervisor, in the absence of the jury, was questioned by the trial court and Banter's attorney about his duties and responsibilities relating to the laboratory's record keeping. His answers were such that the requirements of Evid. R. 803(6) were met. His answers were admissible as an exception to the hearsay rule.

Issue 3.

Banter was sentenced to the advisory, or presumptive, sentence of ten years for a Class B felony. *See* Ind. Code §35-50-2-5. Banter complains that the trial court failed to

consider the mitigating circumstances that Banter had no prior criminal record, and that he had been diagnosed as being mildly mentally handicapped.

Sentencing decisions are within the trial court's discretion. *Vennard v. State*, 803 N.E.2d 678, 683 (Ind. Ct. App. 2004).

When a defendant offers evidence of mitigators, the trial court has the discretion to determine whether the factors are mitigating, and the trial court is not required to explain why it does not find the proffered factors to be mitigating. *Burgess v. State*, 854 N.E.2d 35, 38 (Ind. Ct. App. 2006). The trial court is not required to give the same weight as the defendant does to mitigating evidence. *Id.* An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. *Id.*

Banter did not testify at his sentencing hearing. Instead Banter had his lawyer offer remarks to the trial court. First, the fact that Banter had no prior criminal history received the merest of mention at the sentencing hearing. It is understandable that the trial court did not consider this as a mitigating factor. The trial court did note the summary of psychological findings submitted by Banter and suggested that hopefully Banter would receive treatment while in the custody of the Department of Correction. It cannot be said that Banter's mental condition went unnoticed.

Of more importance to this issue is that the trial court need not set forth its reasons, however, when imposing the presumptive sentence. *Burgess*, 854 N.E.2d at 38. Therefore, if the trial court does not find any aggravators or mitigators and imposes the

presumptive sentence, the trial court does not need to set forth its reasons for imposing the presumptive sentence, or advisory sentence. *Id.*

The remainder of Banter's argument on this issue, that the sentence rendered is inappropriate in light of the nature of the offense and the character of the offender, is not supported by cogent argument and is waived. *See Lyles v. State*, 834 N.E.2d 1035, 1050 (Ind. Ct. App. 2005).

CONCLUSION

The trial judge did not abuse his discretion by admitting the challenged evidence. The trial court did not err in allowing the laboratory supervisor to testify. Banter was properly sentenced.

Judgment affirmed.

KIRSCH, J., and ROBB, J., concur.